NO. 80-5693

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MURRIEL DON CRAWFORD, JR.,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS IN CONNECTION WITH PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

COLVIN & BOTSFORD

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Counsel for Petitioner

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TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW Petitioner, MURRIEL DON CRAWFORD, JR., by and through his attorneys of record, and pursuant to Rule 46, Rules of the Supreme Court [effective June 30, 1980], presents this his Motion for Leave to Proceed In Forma Pauperis in Connection With Petition for Writ of Certiorari to the Texas Court of Criminal Appeals, and as grounds therefor, would respectfully show this Honorable Court the following:

I.

Pursuant to Rule 46 of the Rules of this Court, motion is hereby made that Petitioner be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavit. Leave to proceed in forma pauperis has not been sought in any other court below.

Respectfully submitted,

COLVIN & BOTSFORD

EMMETT COLVIN
DAVID L. BOTSFORD
5206 McKinney Ave.
Dallas, TX 75205

SELDON B. HALE
310 W. 6th Street
Amarillo, TX 79101

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THE STATE OF TEXAS,
Respondent

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS IN CONNECTION WITH PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

On this the 15 day of Oct., 1980, personally appeared before me, MURRIEL DON CRAWFORD, JR., a person known to me, and who being first duly sworn, did depose and state the following:

"My name is Murriel Don Crawford, Jr., and I am the same Murriel Don Crawford, Jr., who is the Appellant in the case styled Murriel Don Crawford, Jr. v. The State of Texas, No. 57,602, in the Texas Court of Criminal Appeals. I am the Petitioner in the "Motion for Leave to Proceed In Forma Pauperis in Connection with Petition for Writ of Certiorari to the Texas Court of Criminal Appeals" attached hereto. I am presently an inmate at the Texas Department of Corrections and have been so incarcerated since I was convicted of the offense of capital murder in the 181st Judicial District Court of Potter County, Texas. I was assessed the death penalty. My conviction and sentence have been reviwed by the Texas Court of Criminal Appeals and they have been in all things affirmed. I want to obtain review of my conviction and sentence by filing a petition for writ of certiorari in the Supreme Court of the United

States."

" I further state that I am unable to obtain or secure the cost of said proceedings as I have no funds or property with which to pay or secure the cost thereof. I am not currently employed; I have received no income during the past twelve months from any source; I do not own any cash, savings or checking accounts, real or personal property; and I have no dependents. I believe that I am entitled to redress and I am making this affidavit in good faith."

"I understand that a false statement will subject me to penalties for perjury."

Murriel Don Crawford Jr.
MURRIEL DON CRAWFORD, JR.

SUBSCRIBED and SWORN TO BEFORE ME this the 15 day of Oct, 1980.

A. J. Murdock
NOTARY PUBLIC in and for
Walker _ Connty, Texas

My Commission Expires:

A. J. MURDOCK
Notary Public, Walker County, Texas.
My term expires: July 17, 1981.

AFFIDAVIT

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EXHIBIT A

NO. 80-5693

IN THE

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OCTOBER TERM, 1980

MURRIEL DON CRAWFORD, JR.,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

A F F I D A V I T

BEFORE ME, the undersigned Notary Public in and for Travis County, Texas, on this day personally appeared Thomas Lowe, Clerk, Texas Court of Criminal Appeals, known to me to be the person whose name is subscribed hereto, who being first duly sworn in the manner provided by law, on oath stated as follows:

I, Thomas Lowe, Clerk of the Texas Court of Criminal Appeals at Austin, Texas, do hereby certify that the records of this Court are prepared and maintained under my direction

pursuant to my official duties as Clerk for the Texas Court of Criminal Appeals, and that they are true and correct. I do hereby certify that on October 22, 1980, the Court granted leave to file Appellant's second motion for rehearing in the case styled Murriel Don Crawford v. The State of Texas, Cause No. 57602, on appeal from Potter County, Texas. That case was then submitted to the Court en banc on November 12, 1980, and it is currently under consideration by the Court.

Thomas Lowe

THOMAS LOWE, CLERK
Texas Court of Criminal Appeals

SWORN TO AND SUBSCRIBED before me, the undersigned authority by the said Thomas Lowe, Clerk, Texas Court of Criminal Appeals, on this the 1ST day of December, 1980, to certify which witness my hand and seal of office.

Paul Womack

NOTARY PUBLIC in and for
Travis County, T E X A S
PAUL WOMACK

My commission expires:

APRIL 18, 1981.

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THE STATE OF TEXAS,
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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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SELDEN B. HALE
310 W. Sixth
Amarillo, Texas

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A STATE EVIDENTIARY STATUTE MAY BE UTILIZED TO JUSTIFY THE READING OF THE FIRST CONFESSION OF A NON-TESTIFYING CO-DEFENDANT, PLACING THE GUN IN THE HANDS OF PETITIONER, AND PROHIBIT THE ADMISSION OF THAT NON-TESTIFYING CO-DEFENDANT'S SECOND CONFESSION, EXPRESSLY REPUDIATING THE FIRST CONFESSION, WITHOUT VIOLATING PETITIONER'S RIGHTS TO CONFRONTATION AND DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS?

II.

WHETHER THE APPLICATION OF THIS COURT'S OPINION IN ADAMS V. TEXAS DEPENDS UPON A CONTEMPORANEOUS OBJECTION AT TRIAL WHEN SUCH AN OBJECTION HAD BEEN HELD TO BE WITHOUT MERIT BY THE TEXAS COURT OF CRIMINAL APPEALS SIX MONTHS PRIOR TO THE DATE OF PETITIONER'S TRIAL?

PARTIES TO THE PROCEEDING

The parties to the proceeding are: (1) Murriel Don Crawford, Jr., and (2) the State of Texas, by and through her Attorney General, the Honorable Mark White.

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REFERENCE TO OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals on original submission is unreported as of this date. It is appended hereto as Appendix A.

The Petitioner's Motion for Leave to File Rehearing was denied, and a copy of the Court's opinion as to rehearing is appended hereto as Appendix B.

JURISDICTION

The opinion of the Texas Court of Criminal Appeals on original submission was delivered on July 16, 1980. On July 30, 1980, Motion for Leave to File Rehearing was filed. Rule 11, Rules of the Texas Court of Criminal Appeals [effective January 1, 1978]. On September 17, 1980, the Motion for Leave to File Motion for Rehearing was denied [see Appendix B]. Under Rules 20.1 and 20.4, Rules of the Supreme Court [effective June 30, 1980], this Petition is timely filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be seized for public use without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to

be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

Texas Code of Crim. Pro. Ann., Article 38.24, provides:

"When part of an act, declaration or conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, as when a letter is read, all letters on the same subject between the same parties may be given. When a detailed act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood or to explain the same may also be given in evidence."

Tex. Penal Code Ann., Section 12.31(b) provides:

"Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

STATEMENT OF THE CASE

Petitioner and David Mabra (co-defendant) were both indicted for the capital offense of murder during the course of committing robbery. Petitioner, who was tried separately from his co-defendant, entered a plea of guilty to the charge. After a trial before a jury on the issue of punishment, the jury answered the two special issues in the affirmative. Accordingly, the Trial Court assessed Petitioner's punishment at death.

FACTS RELEVANT TO QUESTION I:

On October 22, 1975, Petitioner and David Mabra entered a convenience store in Amarillo, Texas. Either Petitioner or his co-defendant [David Mabra] carried the .410 shotgun into the store. During the robbery, Edith Whitfield was shot and killed.

On August 25, 1976, Petitioner and Mabra were both arrested on an unrelated offense. Petitioner and Mabra were questioned separately. Mabra gave a written statement that exculpated Mabra. Specifically, it stated that Petitioner carried the gun into the store and fired the gun two times at Whitfield [i.e., Mabra's first statement]. Petitioner was confronted with Mabra's first statement. In response thereto, Petitioner gave a written statement to the effect: (1) that Mabra had taken the gun into the store; (2) that it had accidently discharged, hitting Whitfield; and (3) that Mabra then intentionally shot Whitfield as she was moaning from the effect of the first discharge.

The day after Petitioner gave his written statement, Mabra gave a second written statement [i.e., se-

cond statement]. Mabra's second statement was to the effect: (1) that he [Mabra] had carried the gun into the store; (2) that Petitioner grabbed the gun when he [Mabra] threatened Whitfiel ; and (3) that the gun accidently discharged when Petitioner grabbed the gun from him [Mabra].

At trial, Petitioner testified that he was a party to the offense, but he denied carrying the gun into the store or shooting the gun. Petitioner further testified that Mabra killed Whitfield and Petitioner introduced his [Petitioner's] written statement into evidence.

On cross-examination of Petitioner, the prosecutor was permitted to elicit, over Petitioner's objection, the fact that Petitioner had given his written statement only after he had been confronted with Mabra's statement implicating Petitioner [i.e., Mabra's first statement] [Trial Record 815]. The prosecutor, over Petitioner's objection, was then permitted to cross-examine Petitioner from Mabra's first statement [Trial Record 818 et. seq.] Finally, the prosecutor was permitted, again over Petitioner's objection, to read a large portion of Mabra's first statement [in the presence of the jury] in order to cross-examine Petitioner [Trial Record 820-823]. The basis of Petitioner's objection was that Mabra's first statement was hearsay and that the prosecutor's actions violated Petitioner's Sixth Amendment right to confrontation and cross-examination [Trial Record 815, 816, 818-822].

On redirect examination, defense counsel attempted to question Petitioner by reading portions of Mabra's second statement to Petitioner [Trial Record at 837-839]. Petitioner was prohibited from reading and/or introduc-

cing into evidence Mabra's second statement [Trial Record 837-839].

Petitioner raised the above issues on direct appeal as "Points of Error No. 1, 2, and 3". The Texas Court of Criminal Appeals overruled Petitioner's contentions by holding that since Petitioner's statement was made after Petitioner had been confronted with Mabra's first statement, Tex. Code. Crim. Pro. Ann., Article 38.24 jusitfied the cross-examination from and reading of Mabra's first statement [Appendix A at 6]. The Court concluded that even if it had been error to read and cross-examine from Mabra's first statement, any error would have been harmless [Appendix A at 7-8]. The Court did not address the exclusion of Mabra's second statement.

FACTS RELEVANT TO QUESTION II

On April 11, 1979, jury selection began. During the course of individual voir dire, the State examined prospective juror, Martha Stulce [Trial Record 301-306 contained in Appendix C]. Stulce positively and unequivocally stated: (1) that she did not have any beliefs or scruples that would cause her to be unable to vote for the death penalty in a proper case; and (2) that she believed that the death penalty was a deterrent to crime and was justified [Trial Record 301]. The prosecutor then explained the Texas law regarding the special issues submitted at the punishment stage of the trial. Thereafter, Stulce stated that the effect [i.e., life or death] of the answers to the special issues would affect her deliberations [Trial Record 306]. The prosecutor then asked that Stulce be excused for cause under Tex.

Penal Code Ann., Section 12.31(b).

Petitioner's counsel, over the objections of the prosecutor, attempted to question Stulce on the difference between being "affected" generally and failing to answer the special issues impartially.

The Trial Judge excluded Stulce on the basis of the prosecutor's challenge for cause. Although no objection was voiced by Petitioner at trial, it should be noted that six months prior to the voir dire herein, the Texas Court of Criminal Appeals had held that there was no merit to an objection that it was improper to excuse a juror qualified under Witherspoon v. Illinois, 391 U.S. 510 (1968) on the broader ground of Tex. Penal Code Ann., Section 12.31(b). Moore v. State, 542 S.W. 2d 664 (Tex. Cr. App. 1976). Nevertheless, the exclusion of Stulce was raised by Petitioner on his direct appeal to the Texas Court of Criminal Appeals as "Point of Error No. 8". The Texas Court of Criminal Appeals overruled the Petitioner's contention in three sentences by holding that the "[f]ailure to object to the improper exclusion of a potential juror waives such error on appeal " [Appendix A at 11-12].

REASONS FOR GRANTING THE WRIT

I.

This Court should grant the writ to determine whether Tex. Code Crim. Pro. Ann., Article 38.24 can be utilized to justify violations of the Sixth and Fourteenth Amendments.

The right to confront and cross-examine witnesses is guaranteed by the Sixth Amendment to the Constitution of the United States. Pointer v. Texas, 380 U.S. 400 (1963). This Sixth Amendment right is essential to due process and is hence applicable to the states via the Fourteenth Amendment. Pointer v. Texas, supra; Chambers v. Mississippi, 410 U.S. 284 (1973); Roberts v. Russell, 392 U.S 293 (1968).

As a general proposition, the introduction of a non-testifying co-defendant's confession implicating the defendant violates that defendant's Sixth Amendment right to confrontation and to cross-examination. Douglas v. Alabama, 380 U.S. 415 (1965); Bruton v. United States, 391 U.S. 123 (1968); Nelson v. O'Neil, 402 U.S. 622 (1971). State evidentiary rules which have attempted to sanction violations of Sixth Amendment rights have been struck down or forced to yield to the Sixth Amendment. Washington v. Texas, 388 U.S. 14 (1967); Chambers v. Mississippi, supra. However, not all violations of Sixth Amendment rights are harmful. Schneble v. Florida, 405 U.S. 427 (1972); Parker v. Randolph, ___ U.S. ___ (1979).

In the present case, Tex. Code. Crim. Pro. Ann., Article 38.24 was utilized to justify the reading of and cross examination from the confession of a non-testifying co-defendant [i.e., Mabra's first statement]. Since such action was

the functional equivalent of introducing the confession of a non-testifying co-defendant, the Petitioner's Sixth and Fourteenth Amendment rights were violated. Douglas v. Alabama, supra; Bruton v. United States, supra; Chambers v. Mississippi, supra. Once that violation occurred, defense counsel unsuccessfully attempted to question Petitioner [on redirect examination] from that non-testifying co-defendant's second confession. The inability to do so rendered the error harmful as it created a false impression before the jury [to-wit: that Mabra, the co-defendant, claimed to be innocent and that Petitioner confessed simply to place part of the blame for the murder on Mabra when, in actuality, Mabra repudiated his first statement, admitted to carrying the gun into the store, and claimed that the gun's discharge was accidental]. In essence, Petitioner was "whipsawed".

II.

This Court should grant the writ to determine whether application of Adams v. Texas, ___ U.S. ___ (1980), depends upon a contemporaneous objection at trial.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court held that a venireman may be excused for cause when he is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings". 391 U.S. at 522 n. 21. But, "[i]f the voir dire testimony...indicates that veniremen were excluded on any broader basis...the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." Id.

In response to this Court's opinion in Furman v. Georgia, 408 U.S. 238 (1972), decided together with Branch v. Texas, the Texas legislature enacted a capital punishment scheme calling for a bifurcated trial on the issues of guilt/innocence and punishment. 1973 Tex. Gen. Laws, ch. 426, at pp. 1124-1129. Under this law, if an accused is found guilty of capital murder, the jury's sole function at the punishment phase of the trial is to answer two [or depending on the facts, three] statutorily prescribed questions. An affirmative answer to all of the questions [2 or 3] submitted to the jury automatically results in the imposition of the death penalty; a negative answer to any of the questions results in a life sentence.

Part of the statutory capital punishment scheme is Tex. Penal Code Ann., Section 12.31(b), which provides:

> "Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

On October 6, 1976, the Texas Court of Criminal Appeals held that there was no merit to an objection that it was improper to excuse a juror qualified under Witherspoon on the broader ground of Tex. Penal Code Ann., Section 12.31(b). Moore v. State, 543 S.W. 2d 664 (Tex. Cr. App. 1976). See also cases cited in Adams v. Texas, ___ U.S. ___ (1980) at n. 5.

On April 11, 1977, voir dire in the present case began. During the course of the voir dire, the trial court excluded prospective juror Stulce pursuant to Tex. Penal Code Ann., Section 12.31(b). Stulce, however, was

absolutely qualified under Witherspoon.

On June 25, 1980, this Court's opinion in Adams v. Texas, supra, was delivered. The Court discussed the relationship of Witherspoon and Section 12.31(b) and concluded that:

> "[t]he State could, consistently with Witherspoon, use §12.31(b) to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths. But the use of §12.31(b) to exclude jurors on broader grounds based on their opinions concerning the death penalty is impermissible."

The Adams Court went on to examine the facts of Adams and found that the inquiry under Section 12.31(b) was improper. Thus, Section 12.31(b) had been applied to exclued jurors.

> "...whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected. It does not appear in the record before us that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme."

Application of Adams to the instant cause reveals that although Stulce did acknowledge that she might be affected by the mandatory penalty of death or life, she was not so irrevocably opposed to capital punishment as to be constitutionally excluded under Section 12.31(b). Unlike Adams, however, Petitioner did not object to the exclusion of the Witherspoon-qualified juror (Stulce) in the trial court. Nevertheless, Petitioner made two attempts to demonstrate that Stulce was in fact qualified under Section 12.31(b), both of which were objected to by the prosecutor. Furthermore, an objection to the Court's action in excluding Stulce was without merit

under Moore v. State, supra. Thus, a contemporaneous objection would have served little purpose.[1] Finally, it appears that the Texas Court of Criminal Appeals has altered, since the date of its opinion herein, its position on the necessity of objecting to the improper exclusion of a Witherspoon-qualified juror under Section 12.31(b). See Loudres v. State, ___ S.W. ___ (No. 63,675; delivered September 10, 1980). In Loudres, the prosecutor (as did the prosecutor herein) objected to the defense counsel's attempt to show that veniremen, qualified under Witherspoon, were also qualified under Section 12.31(b). This is exactly what Petitioner's trial counsel attempted to do. The defendant in Loudres, however, did not object to the exclusion of five other jurors who were excused solely under Section 12.31(b). The issue of waiver was not raised by the Loudres court, although the defendant's conviction was reversed on Adams error.[2]

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Honorable Court issue a writ of cer-

1. It should be noted that the purpose of an objection in Texas is to give the trial court and the prosecutor notice of the alleged deficiency so that they can have an opportunity to correct that deficiency. Zillender v. State, 557 S.W. 2d 515 (Tex. Cr. App. 1977). Thus, since it was apparent that Stulce was qualified under Witherspoon and was being excluded under Section 12.31(b), an objection would have been worthless.

2. In Evans v. Britton, No. 79-2674 (October 15, 1980), the Fifth Circuit was confronted with a question not addressed in Beck v. Alabama, ___U.S.___(1980). In Beck, the Supreme Court was confronted with a challenge to the Alabama death penalty statute and held that a sentence of death could not be constitutionally imposed after a jury verdict of guilt of a capital offense when the jury was statutorily precluded from considering a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported a verdict of such a lesser included non-capital offense. In Evans, petitioner brought habes corpus action under the authority of Beck. The State asserted that Evans had not been harmed by the Alabama "preclusion clause" since Evans had not even attempted to introduce evidence of a lesser included offense. The Fifth Circuit stated:

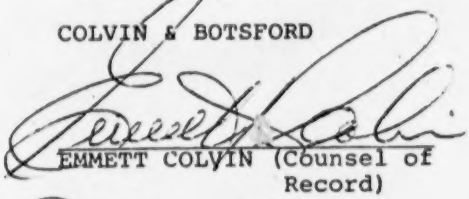
> "It seems to us, however, that it offends the most fundamental notions of fairness for the state to tell Evans that there is no lesser offense and then later urge that his death sentence should be upheld because he failed to present evidence which would prove a lesser included offense."

The analogy to the present case is direct and convincing.

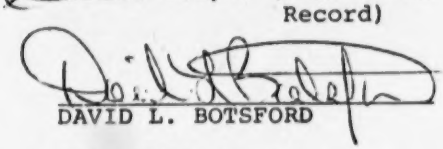
tiorari to the Texas Court of Criminal Appeals to review this case for the reasons stated above, and that this Court reverse Petitioner's conviction and sentence of death.

Respectfully submitted,

COLVIN & BOTSFORD



EMMETT COLVIN (Counsel of Record)



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APPENDIX A

OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS ON ORIGINAL SUBMISSION

MURRIEL CRAWFORD, JR., Appellant

NO. 57,602, v. - - - Appeal from Potter County

THE STATE OF TEXAS, Appellee

OPINION

Muriel Don Crawford appeals from his conviction upon a plea of guilty to the offense of capital murder. Punishment was assessed at death.

The record reflects that a few minutes after midnight on the morning of October 22, 1975, appellant was awakened in his apartment by co-defendant David Mabra. Approximately forty-five minutes later, Mabra and appellant drove to the farm of Jack Watson, a former employer of Mabra's. There they stole a hunting knife, lariat rope and binoculars from an International Scout parked on the farm property, along with two .12 and .410 gauge shotguns and a .22 caliber rifle. They then went to appellant's apartment with the stolen goods.

A short time later, appellant and Mabra drove in appellant's pickup truck to a 7-11 Store, intending to rob the cashier. They abandoned their plan and proceeded to an Exxon service station with similar intentions. They again became nervous and left the station without robbing the attendant. Finally, appellant and Mabra drove to a Toot 'n' Totum food store and parked appellant's truck where it could not be readily seen. Carrying the .410 shotgun which had been stolen from Jack Watson, the pair entered the store and robbed the night cashier, Edith Whitfield, of $32.00. After Mrs. Whitfield handed appellant the contents of the cash register in a paper bag, appellant fired at her, narrowly missing her head. Appellant then fired a second shot at point blank range and struck Mrs. Whitfield in the left eye, causing her instantaneous death.

The two men fled the scene of the murder and returned to appellant's apartment. There they gathered together all the

goods which had been stolen from the Watson farm and placed them, along with the murder weapon, in the trunk of Mabra's car. The pair got into the car and headed for Jack Watson's farm but were stopped en route by Amarillo police officer Tom Porter because the muffler made excessive noise. A traffic citation was issued to Mabra and both defendants were interviewed by Officer Porter. Mabra gave the officer permission to search the car, but the officer declined and appellant and Mabra were told they were free to go. They proceeded to the Watson farm where they replaced the stolen items, including the murder weapon, in the Scout from which they had been taken. Appellant and Mabra drove back to Amarillo.

Three weeks after the murder of Edith Whitfield, appellant and Mabra initiated a conversation with Jim White, a neighbor and friend. In the course of this conversation, appellant bragged to White that he and Mabra had robbed the Toot 'n Totum store and that he himself had shot the deceased in the eye and "pushed her brains out the top of her head." Appellant described for White their flight to the Watson farm, their encounter with the Amarillo police and other details of the crime. He related that they returned to the scene of the crime intending to see whether or not the Toot 'n Totum was equipped with cameras which might have recorded the murder and robbery on film. Appellant stated to White that if Officer Porter had opened the trunk of Mabra's car he would have stabbed him. Jim White testified that as appellant described the grisly details of the crime he showed no shame, sorrow or guilt. Appellant's only regret was, as he told White, that he did not stop to eat candy while in the Toot 'n Totum store.

Jim White informed Amarillo police detective Gary Richards of his conversation with appellant and Mabra. Both appellant and Mabra were interviewed by Detective Richards concerning the crime and were released. Following their release, they returned

to the Watson farm and stole the .410 and .12 gauge shotguns which they had previously stolen. The guns were sold by appellant to two workers at Maywood, Inc., where he was employed.

Prior to his arrest, appellant admitted to three fellow employees at Maywood that he had murdered the deceased. Karen Richie testified that appellant told her that he had done the shooting. He laughed about the incident. Sandra Carreker testified that appellant stated to her on a coffee break, "Maybe they'll come and get [me] for shooting that old lady." On that occasion, too, he laughed about the murder. Keith Carreker testified that appellant told him that he "shot that old bitch in the face." Carreker stated that when he asked appellant if he was drunk, appellant answered that he was cold sober and that if Carreker said anything to anyone about the murder his partner would "waste him."

Ricky Wayne Holik testified that in January, 1976, he, David Mabra and the appellant attended a concert in Amarillo. After the concert, at appellant's instigation, the three of them went to Maywood, Inc. There they burglarized the building and stole a number of tools. To destroy evidence of the break-in, appellant set fire to the building. On August 25, 1976, appellant and Mabra were arrested for the burglary of the Maywood plant. While in custody, appellant confessed to the burglary and, later, to the murder of Edith Whitfield. His written confession was admitted into evidence at trial.

Thirteen grounds of error are advanced in appellant's brief. First he complains of testimony wherein reference was made to an oral statement of the co-defendant David Mabra.

"Q. (Prosecutor) And did you thereafter have a discussion and an interview with Don Crawford?

"A. (Detective Richards) I did.

"Q. Also with a fellow named David Mabra?

"A. Yes.

" * * *

"Q. In any event, after your -- did you have occasion to ask the defendant, Don Crawford, inquire whether or not he or Richard or David Mabra had been involved as the robbers and murderers in that Toot 'n Totum murder?

"A. Yes, I did.

"Q. Did they admit it, deny it, or what?

"A. They denied it."

Appellant contends that since David Mabra was not on trial and did not testify any statement made by him was inadmissible against the appellant.

There was no objection to the testimony. Mabra's statement, although hearsay as to the appellant, was not inculpatory. Under such circumstances, any error committed was harmless. Thomas v. State, 533 S.W.2d 796 (Tex.Cr.App. 1976).

Appellant contends that the trial court erred in permitting the district attorney to read sections of David Mabra's inadmissible initial confession while cross-examining the appellant. He contends that the prosecutor did not cross-examine appellant from the statement, but that he used cross-examination as a guise under which to introduce large portions of the co-defendant's confession before the jury. He also complains of the following statement made by the district attorney during his cross-examination of appellant:

"You are still sticking to the version you gave after Mabra fingered you, that Mabra took [the gun] in."

Appellant argues that the prosecutor's remarks made reference to the confession of the non-testifying co-defendant in which appellant was blamed for the actual shooting.

In light of the fact the jury returned a directed verdict upon appellant's plea of guilty, it cannot be said that the improperly admitted confession contributed to appellant's conviction. A plea of guilty before a jury admits all of the elements of the offense and is conclusive of a defendant's guilt. See Fierro v. State, 437 S.W.2d 833 (Tex.Cr.App. 1969).

Appellant, however, contends that the evidence bore heavily on the jury's determination of the special issues which, under

Article 37.071(d)(2)(e), V.A.C.C.P., resulted in the assessment of the death penalty. In his written confession which was introduced into evidence by defense counsel he admitted that he was a party to the robbery and murder of Edith Whitfield. He also testified that he helped prepare for and commit the robbery. He denied, however, carrying the gun or shooting the deceased. The prosecution, in cross-examining the appellant, read certain portions of David Mabra's first confession which named appellant as the one who carried the weapon into the store and shot the deceased. It is appellant's theory that the jury assessed the death penalty on the basis of its belief that appellant was the "trigger man", and that without David Mabra's confession it would have assessed a life sentence.

Appellant testified that he signed the confession in order to clear his conscience and that he felt a great sense of relief after having done so. It was only after reading Mabra's statement that appellant said to Detective Garrett: "My God, he's putting us both in the electric chair," whereupon he immediately gave a written statement admitting his involvement in the crime but placing the blame for the shooting on David Mabra.

Article 38.24, V.A.C.C.P., provides:

> "When part of an act, declaration or conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, as when a letter is read, all letters on the same subject between the same parties may be given. When a detailed act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood or to explain the same may also be given in evidence."

In Vanderbilt v. State, 563 S.W.2d 590 (Tex.Cr.App. 1978), we observed that Article 38.24 does not restrict the explanatory act, declaration, conversation, or writing to the time when the act, declaration, conversation or writing sought to be explained occurred but extends the rule so as to render such acts or statements admissible, if necessary to a full understanding of, or to explain the acts or statements introduced in evidence by the adverse party.

Mabra's confession was read aloud to appellant by Detective Garrett during the conversation preceding appellant's confession. Appellant having introduced his own statement into evidence, the State was properly permitted to give evidence of other writings, conversations and transactions which fully explained appellant's confession, the context in which it was given and the motive behind it. In short, the prosecution was entitled to prove the whole of what was said immediately prior to appellant's confession under Article 38.24, supra.

Even if it had been error for the prosecutor to read portions of the co-defendant's confession while cross-examining appellant, such error would not merit reversal. The other evidence against appellant was, as a whole, overwhelming. The evidence which, in particular, showed appellant

to have been the trigger man was so great as to render the co-defendant's statement relatively insignificant. Appellant admitted to four friends that he had shot Edith Whitfield. As in Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972), the appellant's confession was minutely detailed and completely consistent with the objective evidence. And, as in Schneble, "the 'minds of an average jury' would not have found the State's case significantly less persuasive" had the prosecutor's recitation of Mabra's confession been excluded. There was a joint trial in the Schneble case. In the present case there was no joint trial. We conclude that the reasoning in the Schneble case applies here. If any error was committed, it was harmless.

Next, appellant asserts that the prosecutor was erroneously permitted to inject false evidence at trial. During cross-examination, the following exchange took place between the district attorney and appellant:

"Q. You had something to shoot Mrs. Whitfield with, though, didn't you?

"A. Not in my possession.

"Q. Walked in there with a loaded gun, didn't you?

"A. No, sir.

"Q. You are still sticking to the version you gave after Mabra fingered you, that Mabra took it in?" (Appellant's emphasis)

Appellant contends that by these remarks the prosecutor implied to the jury that appellant was lying when he denied carrying the .410 shotgun into the Toot 'n Totum.

Appellant argues that the prosecutor's remarks concerning his carrying of the murder weapon were made in bad faith and with knowledge of their falsity. The basis for this contention is the fact that in his second confession David Mabra denied shooting Edith Whitfield but admitted that he initially carried the gun into the store. In his brief, appellant claims that a polygraph examination of Mabra supported the truth of his second written statement. Appellant theorizes that the prosecutor knew the results of the polygraph, knew that appellant did not carry the gun into the Toot 'n Totum, and consequently, should not have implied to the jury that appellant walked into the Toot 'n Totum brandishing the murder weapon. For the prosecutor to do so, appellant asserts, was to introduce before the jury evidence which he knew to be false.

This contention is without merit. Appellant assumes that the district attorney was obligated to believe David Mabra's second statement (in which he admitted carrying the gun into the store) and disbelieve Mabra's initial confession (in which he stated that appellant carried the gun). The prosecutor was under no such obligation regardless of the fact that a polygraph examination had been conducted. Results of polygraph examinations, by virtue of their unproven reliability, have consistently been held to be inadmissible for any purpose. Reed v. State, 522 S.W.2d 466 (Tex.Cr.App. 1975); King v. State, 511 S.W.2d 32 (Tex.Cr.App. 1974); Lewis v. State, 500 S.W.2d 167 (Tex.Cr.App. 1973); White v. State, 496 S.W.2d 642 (Tex.Cr.App. 1973). The prosecutor had no duty whatever to rely on such inadmissible and potentially unreliable data in determining which of David Mabra's confessions were true. The prosecutor had no duty to believe either of Mabra's statements. Appellant, having

voluntarily taken the stand, was subject to being discredited like any other witness. In his attempt to impeach appellant's testimony, the prosecutor was free to reject the co-defendant's versions of the crime and vigorously cross-examine the appellant concerning his possession of the murder weapon immediately prior to the shooting. Myre v. State, 545 S.W.2d 820 (Tex.Cr.App. 1977); Weber v. State, 472 S.W.2d 136 (Tex.Cr.App. 1971); Patterson v. State, 338 S.W.2d 469 (Tex.Cr.App. 1960).

Appellant contends that the court erroneously allowed into evidence extraneous offenses of burglary and arson. Ricky Wayne Holik testified at length concerning appellant's commission of burglary and arson at Maywood, Inc. There was no objection to such testimony until after Holik had completed his testimony on direct examination. Thereafter, appellant took the stand and, on direct examination by defense counsel, testified to having committed the burglary of Maywood, Inc. The admission of improper evidence will not constitute reversible error where the defendant voluntarily gives testimony the same as that which is admitted over objection. Cowan v. State, 562 S.W.2d 236 (Tex.Cr.App. 1978); Lovell v. State, 538 S.W.2d 630 (Tex.Cr.App. 1976); Allen v. State, 536 S.W.2d 364 (Tex.Cr.App. 1976); Watson v. State, 532 S.W.2d 619 (Tex.Cr.App. 1976); Dogget v. State, 530 S.W.2d 552 (Tex.Cr.App. 1975).

Even if error had not been waived, evidence of appellant's extraneous offenses would nevertheless have been admissible. Inasmuch as such offenses showed appellant's tendencies toward criminal conduct, they were relevant and admissible pursuant to Article 37.071, V.A.C.C.P., which gives the trial court wide discretion in determining what evidence may be offered. Robinson v. State, 548 S.W.2d 63 (Tex.Cr.App. 1977); Livingston v. State, 542 S.W.2d 655 (Tex.Cr.App. 1976). No error is presented.

Appellant next argues that the prosecution erred in failing to provide the defense with a copy of an exculpatory police report prior to trial. The requested report stated that appellant had been cleared after his initial interrogation concerning the murder of Edith Whitfield. Appellant alleges that the report was relevant on numerous issues but particularly so on the issue of the voluntariness of his confession and that it should, therefore, have been produced at a pretrial Jackson v. Denno[1/] hearing.

He relies upon Ridyolph v. State, 503 S.W.2d 276 (Tex.Cr. App. 1974), and cases cited therein for the proposition that it is reversible error for the prosecution to either actively suppress or inadvertantly fail to disclose evidence which might exonerate or be of material value to the accused.

In determining whether reversible error has occurred, this Court must look to the three factors which the Supreme Court deemed relevant in Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1971). Those factors are (1) the suppression of such evidence by the prosecution after a request by the defense, (2) the evidence's favorable character for the defense, and (3) the materiality of the evidence. Considering these factors as applied to the facts of the present case, we conclude that no reversible error is shown.

The record before us does not reflect that the requested police report was suppressed by the prosecution. Prior to trial, appellant filed a motion for the disclosure of exculpatory evidence. At the pre-trial hearing appellant's motion was granted. Immediately thereafter, and before the State had had an opportunity to comply with the appellant's motion, a pretrial hearing was conducted on the voluntariness of appellant's

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1/ 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

confession. During the hearing appellant demanded immediate production of the requested report. In view of the fact that the State did furnish appellant with a copy of the report during trial, it cannot be said that such evidence was deliberately or even inadvertantly withheld.

Neither can it be said that the requested report was material. In United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Supreme Court held that (1) the mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish "materiality" in the constitutional sense, and (2) that the omitted evidence must have been such as would create a reasonable doubt about the defendant's guilt. The police report in the present case, had it been provided prior to trial, would not have created a reasonable doubt as to the voluntariness of appellant's confession. Regarding the report's relevance to other issues raised at trial, appellant is not in a position to complain inasmuch as the report, including the exculpatory portions, was admitted into evidence and a copy thereof was furnished to counsel.

When appellant pled guilty, it was immaterial that the officer might not have concluded that he had enough evidence upon which to charge appellant.

Next appellant complains of the prosecution's failure to disclose negative fingerprint test results until the day of trial. He does not allege that any harm resulted from this delay in disclosure. Nor has it been shown that the test results were exculpatory in nature, thus obligating the State to disclose them to appellant. Had they been exculpatory, any error in their delayed disclosure to appellant must be considered harmless in light of appellant's guilty plea and the overwhelming weight of the evidence.

Appellant next alleges that the court erred in excusing potential juror Martha B. Stulce for cause on the grounds that

neither the requirements of Witherspoon v. Illinois,[2/] nor V.T.C.A., Penal Code, Section 12.31, were satisfied. No objection was raised. Failure to object to the improper exclusion of a potential juror waives such error on appeal. Boulware v. State, 542 S.W.2d 677 (Tex.Cr.App. 1976); Granviel v. State, 552 S.W.2d 107 (Tex.Cr.App. 1977).

In four grounds of error appellant alleges that the court erred in refusing to grant a mistrial after the prosecutor introduced before the jury evidence of an oral statement made by the appellant in which he denied committing the charged offense. The statement was neither inculpatory nor prejudicial. Appellant's objection was sustained and an instruction to disregard was given. Error, if any, was cured. Sternlight v. State, 540 S.W.2d 704 (Tex.Cr.App. 1976); Smith v. State, 540 S.W.2d 693 (Tex.Cr.App. 1976); Marlow v. State, 537 S.W.2d 8 (Tex.Cr.App. 1976); Paredes v. State, 500 S.W.2d 160 (Tex.Cr. App. 1973).

He also complains of the following testimony by Karen Richie:

"Q. (By the Prosecutor) Did you talk to David -- yes, to David Mabra -- about the shooting of Mrs. Whitfield?

"A. No sir. When he took his lie detector test --

"MR. FAIRWEATHER: Your Honor, I move for a mistrial at this time."

The witness' answer, although unresponsive, neither prejudiced appellant nor reflected upon his guilt or innocence. The witness' statement made no reference to appellant, but rather, concerned the co-defendant David Mabra. Error, if any, was harmless.

2/ 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1967)

Appellant urges that the prosecutor erred in refusing to furnish appellant a copy of the State's witnesses' statements until after such witnesses had testified. Appellant's contention is without merit and contrary to this Court's holding in White v. State, 496 S.W.2d 642, 645 (Tex.Cr.App. 1973); and Hoffman v. State, 514 S.W.2d 248, 253 (Tex.Cr.App. 1974).

Next he contends that the court erroneously admitted the appellant's written confession into evidence on the grounds that it was induced by police officers' promises that the death penalty would not be sought. The evidence adduced at the Jackson v. Denno hearing showed appellant's confession to have been freely and voluntarily given. Appellant was duly warned of his rights and subjected to no coercion or abuse of any kind. We do not find, nor does appellant direct our attention toward any evidence that appellant's confession was induced by promises that the death penalty would not be sought. Moreover, the confession was introduced by appellant himself. Any complaints regarding its voluntariness were thereby waived. Morales v. State, 466 S.W.2d 293 (Tex.Cr.App. 1971).

Finally, appellant attacks the sufficiency of the evidence upon which the jury could have returned an affirmative finding on special issue No. 2, i.e., that a probability existed that the appellant would commit criminal acts of violence which would constitute a continuing threat to society. Article 37.071(d)(2), V.A.C.C.P. Appellant urges that reversal is required because no testimony was offered by the State specifically in support of this special issue.

It is well established that the introduction of expert psychiatric or psychological testimony is not a prerequisite for a jury finding of "yes" on special issue No. 2. Brock v. State, 556 S.W.2d 309 (Tex.Cr.App. 1977); Burns v. State, 556 S.W.2d 270 (Tex.Cr.App. 1977); Granviel v. State, 552 S.W.2d 107 (Tex.Cr.App. 1977). The testimony adduced at trial concerning the crime itself and the circumstances surrounding its commission may be more probative on special issue No. 2 than any

other evidence which the State might offer. Brock v. State, supra; Burns v. State, supra.

In the present case, as in Brock, the evidence showed that appellant committed a brutal and senseless murder in the course of a robbery even though the deceased had surrendered the contents of the cash register to him and offered no resistance. Appellant's intent was not merely to terrorize the deceased with the initial shotgun blast. His intent was to cause her death by firing again at point blank range. He was later heard to laugh and to brag about the fact that he had seen Edith Whitfield's brains pushed out the top of her head. His statements to Keith Carreker and Jim White reflected his willingness to kill again. After admitting his responsibility for the murder to Keith Carreker, appellant threatened to have him killed if Carreker revealed what he knew to anyone else. Appellant also told Jim White that he would have stabbed Officer Tom Porter if he had attempted to search the trunk of David Mabra's car.

Three months after the murder of Edith Whitfield, appellant committed the offenses of burglary and arson. In committing the latter offense, appellant knowingly created a risk that loss of human life could occur. Both offenses were probative on the issue of whether appellant was likely to commit criminal acts of violence subsequent to the offense charged in the indictment. See Granviel v. State, supra, and Felder v. State, ___ S.W.2d ___ (No. 58,049, April 26, 1978).

For any of his actions appellant showed no remorse or sorrow whatever. His only regret, as has been noted, appeared to be that he did not seize the opportunity to eat candy in the Toot 'n Totum store following the murder. We find that sufficient

evidence was presented from which the jury could conclude that a probability existed that appellant would commit future acts of criminal violence which would pose a continuing threat to society.

No reversible error having been shown, the judgment is affirmed.

Douglas, Judge

(Delivered July 16, 1980)

En Banc

Clinton, J. not participating

MURRIEL CRAWFORD, JR., Appellant

NO. 57,602 v. - - - Appeal from POTTER County

THE STATE OF TEXAS, Appellant

DISSENTING OPINION

The majority holds that the trial court did not err in allowing the prosecutor to read to the jury the critical portion of co-defendant David Mabra's first confession, in which Mabra implicated appellant as the "triggerman" to the offense. The majority further concludes that even if error were committed, the error was harmless beyond a reasonable doubt. As I cannot accept either conclusion, I am compelled to dissent.

Appellant testified in his own defense. He admitted being a party to the offense. However, he denied carrying the shotgun into the store or killing the deceased. He testified that Mabra killed the deceased. Appellant introduced his written confession in support of his testimony. The confession related the same facts as testified to by appellant:

> . . . We went in the Toot N Totum and David was carrying the shotgun. He had it beside his leg. The lady was watching me and he stood in front of the cash register. I went and got some hamburger buns and some lunch meat and came back to the counter. David said "You want to give us some money". She said "What". He said "Do you want to give us some money". She said "Why no, o[f] course not". He put the shotgun on top of the cash register and she said "Anything you want". She opened the cash register and got all the money out of the cash register and put it in a little sack and said "Do you want the change" and I said "No, we don't want the change, what is under the drawer". She raised up the drawer and said "There is only this dime, there is no money here". I said "Well give us the dime". I put the dime in the bag and I took the bag and the lunch meat and the hamburger buns and stepped back from the counter and dropped them. I picked them back up and David put the shotgun back on top of the cash register. When he did, he popped it down against the cash register and it went off. It blew her hair up and scared her and it hurt her because she just moaned so he shot her again. He just stood there with his mouth open and the shotgun on the cash register. I grabbed him by the coat and dragged him out of the store. We got outside and got in the pickup and went back to my apartment . . .

On cross-examination and over defense counsel's objection, the prosecutor elicited from appellant that he gave the confession only

after police showed him a confession given by Mabra earlier that day that exculpated Mabra and placed responsibility for the offense entirely on appellant. The prosecutor then produced Mabra's confession and began to cross-examine appellant with it. Defense counsel strenuously objected that the confession was inadmissible hearsay and the prosecutor's reading it violated appellant's Sixth Amendment right to confront and cross-examine witnesses. The court overruled appellant's objections, and the prosecutor read the following from Mabra's confession:

> . . . Donny parked his pickup in front of the store and I got out to get my snuff. Donny said as I got out of the truck, "I think I'll rob this place." I thought he was joking as we are all the time making comments like this to each other. I went in and picked up a can of Copenhagen snuff and started to put it on the counter. At this time, I heard Donny open the door and looked around and I saw that Donny had the shotgun behind him. Donny said to the lady clerk, "Give me your money." She said, "You've got to be kidding. Is this some kind of joke?" Donny then pulled the shotgun out and placed it on top of the cash register. She gave him the money in a paper sack and then Donny shot one time. He was holding it with one hand and missed the first shot. I saw the lady's hair kinda fluff out and I saw the shot hit the wall. I turned and was trying to get out of the store and yelled "Crawford". As I was running out, I heard the second shot. I did not pay for the snuff and I was so scared that I crushed the can of snuff in my hands. I got back in the pickup and Donny was right behind me. . .

On redirect examination defense counsel attempted to read from another confession given by Mabra the day after he gave the one set forth above. That confession read in pertinent part:

> One other fellow and I drove up to the Toot'n Totum store in the early morning hours, well after midnight, and we went in with the intention of robbing the store. I carried in a .410 shotgun, and I held it on the lady who was the clerk, who I now know to be named Whitfield, while we robbed her, and I also was threatening her with the shotgun after we robbed her when my companion grabbed the gun and it went off twice, shooting the clerk in the head and killing her.
>
> My companion and I ran from the store . . .
>
> The previous statement which I gave to Officers Kirkwood and Collins last night left out the truth about my participation in our attempt to rob the Toot'n Totum and the way I handled the gun and threatened the clerk before she was shot, but this statement truthfully described my real part in the crime. (emphasis added)

The state objected to defense counsel's attempt to read this confession. The court sustained the objection, and prohibited appellant from reading the confession to the jury or alluding to it in any way.

At the hearing on appellant's motion for new trial it was stipulated that at the time of trial the prosecutor was aware of Mabra's second confession. It was further stipulated that the prosecutor knew that the results of a lie detector test administered to Mabra indicated that the second confession was the truth.

The majority concludes that because appellant introduced his confession in evidence, the state "was entitled to prove the whole of what was said immediately prior to appellant's confession," pursuant to Art. 38.24, V.A.C.C.P. I am willing to accept that the scope of Art. 38.24 extends to the situation presented here -- the statute provides in part that:

> . . . When a detailed act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood or to explain the same may also be given in evidence.

However, the trial court egregiously erred in admitting Mabra's first confession without also admitting Mabra's second confession as requested by appellant. As this Court previously has pointed out, the purpose of Art. 38.24 is to reduce the possibility that the fact finder will receive a false impression by hearing only a part of the evidence concerning a conversation, writing, act, or declaration. Vanderbilt v. State, 563 S.W.2d 590 (Tex.Crim.App. 1978); Roman v. State, 503 S.W.2d 252 (Tex.Crim.App. 1974); see Rodriguez v. State, 597 S.W.2d 917 (Tex.Crim.App. 1980)(Phillips, J., dissenting). The admission of Mabra's first confession led the jury to believe that, according to Mabra, appellant wielded the murder weapon and in fact was entirely responsible for the offense. The jury also was informed that appellant confessed only after seeing Mabra's first confession. The inevitable impression left on the jury by this evidence was that Mabra claimed to be innocent, and

that appellant confessed as he did simply in order to place part of the blame for the commission of the murder on Mabra.

This impression was entirely misleading and false. In actuality, Mabra repudiated his first confession, admitting that he carried the shotgun into the store and threatened the deceased with the weapon. This version of the events corroborated several parts of appellant's confession. It undoubtedly would have lent support to appellant's claim that Mabra was the triggerman. Mabra expressly stated that his second confession was the correct version, and the lie detector test confirmed this. Given that the court admitted Mabra's first confession, it was absolutely critical to go forward and admit Mabra's second confession in order to prevent the jury from receiving a totally false impression of the evidence, and to enable the jury to assess Mabra's credibility as a witness. The admission of the first confession without the second constituted error.

Moreover, the majority fails to recognize that the application of Art. 38.24 in this case violates appellant's Sixth Amendment right to confront and cross-examine witnesses. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). This right "has long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). See In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948); Coulter v. State, 494 S.W.2d 876 (Tex.Crim.App. 1973).

Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), a companion case to Pointer, supra, establishes that action such as was taken by the prosecutor in this case denies a defendant his right of confrontation and cross-examination. At the defendant's trial in that case the state called the codefendant to the stand to testify against the defendant. The codefendant, a man named Lloyd, invoked his privilege against self-incrimination and refused to answer any questions. Under the guise of refreshing Lloyd's memory the prosecutor asked Lloyd to confirm or deny

statements read by the prosecutor from Lloyd's confession. Lloyd refused to answer the questions, but the prosecutor continued until he had read the entire confession. The confession inculpated the defendant. The Supreme Court held that reading the confession to the jury was the equivalent of admitting the confession in evidence, and concluded that the defendant's inability to cross-examine Lloyd concerning the confession "plainly denied [him] the right of cross-examination secured by the Confrontation Clause." Id. at 380 U.S. 419.

In Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Supreme Court again held that the admission of a co-defendant's confession denied the defendant his right of cross-examination. The Supreme Court viewed the admission of the confession as so prejudicial that it held the error was not cured by the trial court's instruction to the jury to disregard the confession in determining the defendant's guilt or innocence.

Still later, in Chambers v. Mississippi, supra, the Court held that the application of the Mississippi voucher rule to prevent the defendant from cross-examining a state's witness operated to deny the defendant his rights under the Confrontation Clause. The Court stated:

> . . . The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." Dutton v. Evans, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970); Bruton v. United States, [supra]. It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, [supra]. Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. E.g., Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972). But its denial or significant diminution calls into question the ultimate "'integrity of the fact-finding process'" and requires that the competing interest be closely examined. Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969).

Id. at 410 U.S. 295.

In the present case the competing state interest in applying Art. 34.24, supra, is to insure that the jury does not receive a

false impression by hearing only a part of the evidence concerning an event. As we have seen, that interest was not well served, and in fact was done a positive disservice, by the admission of Mabra's first confession. Thus the state interest in this case, if existent at all, is minimal. Moreover, even if the state interest in presenting the whole picture were well served by the admission of Mabra's first confession, appellant's inability to cross-examine Mabra in order to measure the accuracy of the confession, combined with the extremely prejudicial nature of the matters asserted in the confession, would outweigh the state's interest. Compare Bruton v. U.S., supra.

Douglas, Bruton, and Chambers teach us that when a state evidentiary or procedural law operates to deny a defendant his basic right to confront and cross-examine witnesses, the state law must give way in the absence of a convincing state interest in favor of the application of the law. The admission of Mabra's first confession in this case denied appellant his right to confront and cross-examine witnesses, and no competing state interest under Art. 38.24 was served. The admission of the confession was error of a constitutional dimension.

Contrary to the position of the majority, the error was not harmless beyond a reasonable doubt. The majority's discussion of the matter indicates that it relies on the strength of the State's case regarding appellant's guilt or innocence in determining that any error was harmless. Appellant's guilt or innocence, however, was never in question; appellant pleaded guilty to the jury. The sole task of the jury in this case was to make two determinations:

> (1) whether the conduct of appellant that caused the victim's death was committed deliberately and with the reasonable expectation that the death of the victim or another would result; and
>
> (2) whether it was probable that appellant would commit criminal acts of violence that would constitute a continuing threat to society.

Evidence was adduced at appellant's trial solely to aid the jury in making these two determinations.

The question for our consideration is whether the jury would have found the state's case on punishment significantly less persuasive had Mabra's first confession been excluded from evidence. Cf. Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). If there is a reasonable possibility that the confession contributed to either of the jury's two affirmative answers to the special issues set forth above, the error is not harmless. Cf. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Schneble v. Florida, supra.

The state's case largely consisted of the testimony of four persons to whom appellant bragged that he shot the deceased. The state presented no eyewitness testimony concerning the offense. Appellant took the stand and testified that although he participated in the offense, he was not the triggerman. Appellant contradicted the testimony of the state's witnesses by denying that he told them he shot the deceased. In order to bolster its case that appellant did the shooting, the state introduced Mabra's first confession placing on appellant the entire responsibility for the robbery and murder, and exculpating Mabra.

Mabra's first confession was the only evidence introduced by the state concerning the actual commission of the offense. It was important to the state's case on special issue number one, as it provided the jury with information on the deliberateness of appellant's conduct, and on the expectation that death would result from his conduct. Appellant's admissions to the four state's witnesses shed no light on the circumstances of the offense, and thus were not significantly probative of the deliberateness of appellant's conduct. Appellant's testimony and confession cast doubt on the deliberateness of his conduct that resulted in the victim's death.

Moreover, in affirming the testimony of the state's witnesses that appellant was the triggerman, the confession almost certainly

had an impact on the jurors' minds with respect to special issue number two. Juries undoubtedly (and reasonably) view triggermen as constituting a greater threat to society than nontriggermen. Appellant's testimony and confession raised an issue as to who was the triggerman. Mabra's confession tended to resolve that issue against appellant, and in so doing undoubtedly influenced the jury's determination of special issue number two.

It must be stressed that a jury's inquiries on the punishment issues are qualitatively different from its inquiry on guilt or innocence. The issues to be resolved at the punishment phase are much less precise. Key terms in the punishment issues such as "deliberateness" and "probability" have never been defined, and undoubtedly they are subject to varying interpretations. Predicting future dangerousness is at best imprecise, and often mere speculation. The range of evidence admissible at the punishment stage is largely determined by the trial court in its discretion. See Art. 37.071(a), V.A.C.C.P. Thus the jury has a wide range of factors to consider in resolving the punishment issues. Given the imprecise nature of the inquiries on punishment, and the corresponding potential for disagreement among jurors on the determination of the special issues, it is unreasonable to conclude that the error in admitting Mabra's confession was harmless beyond a reasonable doubt.

In conclusion, the state's case on punishment was not overwhelming. There was ample room, absent Mabra's confession, for the jury to have answered at least one of the two special issues in the negative, thereby limiting appellant's punishment to life imprisonment. The majority errs in concluding that the error was harmless.

This case should be reversed and remanded for a new trial.

I dissent.

PHILLIPS, Judge

Delivered July 16, 1980

En Banc
Roberts, J., joins in dissent.

MURIEL DON CRAWFORD, Appellant

NO. 57,602 VS. - - - - - - Appeal From POTTER County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

Venirewoman Stulce could not have been excused properly; she stated unequivocally that she could consider giving the death penalty, and the only ground for excusing her was a misapplication of Section 12.31(b) of the Penal Code.

"Q. You cannot state that? [The "oath" of Sec. 12.31(b)]

"A. No.

"Q. You would think about what the effect of your answers were, and that would necessarily intrude on your decision of how to answer those issues?

"A. Right.

"Q. That's just human, isn't it?

"A. Yes.

"Q. So, actually, you cannot state under oath that your deliberations would not be affected?

"A. No.

"Q. We understand each other, don't we?

"A. I think.

"MR. CURTIS: Your Honor, we would respectfully challenge for cause based on Section 12.31."

This is the very thing that the Constitution forbids. "Such a test could, and did, exclude jurors who stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." Adams v. Texas, ___ U.S. ___, ___ (slip op. at 10) (No. 79-5175, 1980).

Even worse, when defense counsel tried to question the juror on the crucial difference between being "affected"

generally and failing to answer the special issues impartially* (see Adams v. Texas, supra), the court twice sustained the State's objections to the questions because they departed from the statutory language. As Adams v. Texas teaches, it is necessary to go behind the statutory language if misapplication is to be avoided.

In the face of this error the Court today holds that the question was waived because "no objection was raised."

To begin with, the appellant twice asked questions which illustrated the improper application of Section 12.31(b), and objections to his questions were sustained both times. This was sufficient to call the court's attention to its error, and it was better than an objection would have been. It is simply fantastic to say that the appellant, who was struggling to show the trial court that the juror could not be excused under the proper interpretation of Section 12.31(b), waived this ground or even made a procedural bypass of it.

In the second place, the Court can impose this waiver doctrine only by talking out of both sides of its constitutional mouth. On October 6, 1976, we held that there was no merit to an objection that it was improper to excuse a Witherspoon-qualified juror on the broader ground of Section 12.31(b). Moore v. State, 542 S.W.2d 664. Jury selection in this case began six months later (April 11, 1977). Now the Court holds that the appellant was at fault for not raising an objection that we had six months earlier held to be legally worthless. At the least it is ungracious of us to require defense counsel to recognize merit in an argument when we could not; at worst, it denies him due process and due course of law on appeal. It is tantamount to saying that our opinions on constitutional

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*"Can't you answer that factual question honestly, even though you know the effect of your answers?" Counsel also asked, "Do I take it by your answer that knowing the effect of your answer means that you couldn't answer it with complete integrity?" The court rejected the question as irrelevant.

law are so notoriously untrustworthy that attorneys are not justified in following them.

Finally, I am not persuaded that our waiver doctrine is any better than was our mistaken holding on Section 12.31(b). It rose in Boulware v. State, 542 S.W.2d 677 (Tex.Cr.App. 1976), on two legs: waiver and harmless error. The harmless error leg was knocked down promptly in Davis v. Georgia, 429 U.S. 122 (1976). The waiver leg rests on the theories that defendants should not be allowed to "sandbag" trial judges and that counsel may deliberately choose, for tactical reasons, to waive certain rights. As I already have said, it is fantastic to say that this appellant was hiding his objections from the trial court; he was trying to ask questions to advance his (correct) theory, and the trial court rejected him. No tactical choice could have been involved. In any event, it is by no means clear that this doctrine of waiver by failure to object applies to Witherspoon error. See Wigglesworth v. Ohio, 403 U.S. 947 (1971) (reversing decision which held that Witherspoon error was waived). This error affects the very fact-finders; it is not like an improper grand jury venire or the trying of a defendant in a jail uniform.

We have decided this question of waiver in an off-handed manner only three weeks after the decision in Adams v. Texas, ___ U.S. ___ (No. 79-5175, 1980). It should receive full consideration, but it has not. I dissent.

Roberts, Judge

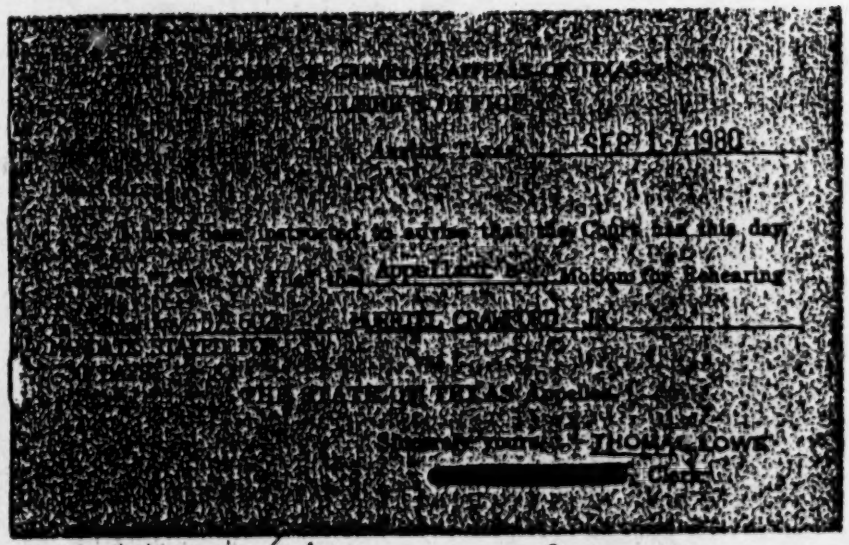
DELIVERED: July 16, 1980

EN BANC

Phillips, J., joins in this dissent.

APPENDIX B

OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS ON MOTION FOR REHEARING



COURT OF APPEALS OF TEXAS
AUSTIN, TEXAS

Austin, Texas SEP 1 7 1980

I have been instructed to advise that the Court has this day

Appellant's Motions for Rehearing

HERBERT CRAWFORD, JR.

THE STATE OF TEXAS, Appellee

Very truly yours, THOMAS LOWE

Clerk

APPENDIX C

VOIR DIRE TESTIMONY OF PROSPECTIVE JUROR STULCE

are open minded?

A. That's true.

MR. FAIRFEATHER: Pass the juror.

MR. CURTIS: The State would excuse.

THE COURT: Mr. Lowak, you are excused and free from any further service on this case.

MARTHA B. STULCE,

a prospective juror, being first duly sworn, was examined and testified on her oath as follows:

EXAMINATION

BY MR. CURTIS:

Q. Mrs. Stulce, I am Tom Curtis, I'll be prosecuting this case for the State. It is a capital murder case in which the State will be asking for the death penalty by a jury verdict if the Defendant is found guilty. Do you understand what we are doing in here, what the jury will be called upon to do?

A. Uh-huh.

Q. Do you have any beliefs or scruples that would cause you to be unable to vote for a death penalty in a proper case?

A. No.

Q. Do you believe that the death penalty is a deterrent to crime and is justified?

A. Yes.

Q. Under some evidence?

A. Yes.

Q. Let me explain to you what our law -- the way death penalty cases are handled, the procedure in Texas for the jury making the decision on these cases.

The jury does not write into its verdict after it's heard the evidence, of course, you haven't heard any evidence now --

A. That's right.

Q. -- and what I tell you is not evidence and what the lawyer for the Defendant when he questions you tells you is not evidence.

But, after you have heard the evidence in the case, the Judge will ask two questions of the jury after the jury has found the Defendant guilty. They will be asked two questions; the first will ask whether the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. The jury is required to answer that question "yes" or "no," depending on the evidence that they have heard up to then.

Secondly, the jury is asked whether there is a probability, not a certainty, but a probability, that the Defendant would commit criminal acts of

violence that would constitute a continuing threat to society. The jury is asked to answer "yes" or "no," whether there is such a probability based on the evidence that they have heard.

After the jury writes "yes" or "no" to those questions, then, the jury is discharged. But, the way the jury answers those questions does determine, as a matter of law, whether the Defendant receives the death penalty or only life in prison. Do you understand? I know this is complicated.

A. Yeah, it's complicated.

Q. The jury doesn't actually write in a life sentence on a verdict form after they have heard the evidence and deliberated, they don't go out and come back in and say "we find the Defendant should be punished by life in the penitentiary," or, "we find the Defendant should be punished by death." They simply write "yes" or "no" in response to those two questions.

If the jury has written "yes" in both -- to both questions, that means in effect the death penalty, and you are entitled to know that even though it's not pronounced until after the jury has left.

If the jury answers either of those questions

"no," then, the Defendant receives only a life sentence. That's carried out by operation of law.

So, the jury's verdict is determinative of what -- whether the Defendant receives a mandatory death sentence or only a life sentence. But, it does not actually write in "life" or "death," it simply answers "yes" or "no" to the questions. Are you with me?

A. Yes, I think I'm with you.

Q. I know it's complicated and confusing. The way a trial is conducted, the jury is first selected and sworn, and then evidence is put on before the jury. Then, lawyers can make summations of the evidence, and then the jury retires to render its verdict.

Your verdict is simply answering "yes" or "no" to these two questions after having found the Defendant guilty. You understand that's what you do?

A. Uh-huh.

Q. That's the way you in effect assess a life sentence or a death sentence.

Do you believe that you can say that this mandatory penalty of death or imprisonment for life will not affect your deliberations on any issue of fact; can you take an oath that you will not be affected on your deliberations of fact on these issues of fact that I described to you, these questions, by

the fact that whether you write "yes" or "no" will mean either a life sentence or a death sentence?

A. Do you want me to say yes or no if I can or I can't?

Q. Yes, ma'am.

A. I would have to listen to it.

Q. All right. Let me read you the law that I am dealing with, maybe you will understand better why I can't ask that question any better than I can.

The section of our Penal Code says this -- I'm just going to read it to you -- prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror, unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

So, because of that law, I am now asking you whether or not you can state under oath -- can you state under oath that the mandatory penalty of death or imprisonment for life will not affect your deliberations on any issue of fact; can you state that it will not?

A. No.

Q. You cannot state that?

A. No.

Q. You would think about what the effect of your answers were, and that would necessarily intrude on your decision of how to answer those issues?

A. Right.

Q. That's just human, isn't it?

A. Yes.

Q. So, actually, you cannot state under oath that your deliberations would not be affected?

A. No.

Q. We understand each other, don't we?

A. I think.

MR. CURTIS: Your Honor, we would respectfully challenge for cause based on Section 12.31.

MR. FAIRWEATHER: Your Honor, before the Court rules, I would like to ask some questions on voir dire.

THE COURT: All right.

Q. (By Mr. Fairweather) Mrs. Stulce, I'm Charles Fairweather, and I represent Donnie Crawford. I heard you say earlier that you were not opposed in principle, at least, to the -- to capital punishment. Am I correct in what you said?

A. Uh-huh.

Q. Now, in Texas we have a funny way of doing things in this type of case, and a jury doesn't write in the words "life in prison" or "death in the electric chair". The jury is asked to answer a factual question, in fact there are two of them. Do you follow me so far?

A. Uh-huh.

Q. You are allowed to know the effect of your answers. If you answer "yes" to these questions, the Judge pronounces the sentence that's mandatory by law, which is death in the electric chair.

If you answer "no" to either one of the questions, the Judge announces the sentence that's mandatory by law of life in prison. Do you follow me so far?

A. Yes.

Q. Can you answer these questions truthfully and honestly, the factual questions, even though you know the effect of your answers?

A. Yes, I think I can.

Q. Now, the first question that you are asked is this: Was the conduct of the Defendant that caused the death of the deceased, was it committed deliberately and with the reasonable expectation that the death of the deceased would result. That's a factual question.

Can't you answer that honestly, even though you know the effect of your answer?

A. Can I answer it honestly?

Q. Yes.

A. If I knew --

Q. Even though you know the effect of your answer?

MR. CURTIS: Your Honor, I object to that, because it is not phrased in terms of the law or the statute, and would not form the basis of a qualification or disqualification.

THE COURT: Yes, I think the objection to the last statement is good, Mr. Fairweather, the way you phrased it.

Q. (By Mr. Fairweather) Let's go to the next question, the question that the Court will ask you in effect is this: Is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society. Now, I call this the crystal ball question; you are asked to predict the future, to what this man might do later on.

My question to you is this: Can't you answer this factual question honestly, even though you know the effect of your answers?

A. (Witness shakes head from side to side.)

Q. Your answer is "no"?

MR. CURTIS: Same objection, Your Honor, it won't form the basis for any sort of challenge for disqualification.

THE COURT: Well, the only thing we are concerned with here now is whether or not she can take the oath required under 12.31.

Q. (By Mr. Fairweather) Do I take it by your answer that knowing the effect of your answer means that you couldn't answer it with complete integrity?

A. No.

THE COURT: Well, no, she just said "yes" and I think that takes care of 12.31. You are free to go, Mrs. Stulce.

LEONARD DEWITT HIGH,

a prospective juror, being first duly sworn, was examined and testified on his oath as follows:

EXAMINATION

BY MR. CURTIS:

Q. You are Leonard Dewitt High?

A. Yes sir.

Q. Mr. High, this case that is going to trial in this court this week is a capital murder case in which the Defendant stands charged with capital murder, and